RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 30 2016
OFFICE OF THE CLERK

No. 15-1111

IN THE

Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF RESPONDENT CITY OF MIAMI

Victoria Méndez
Henry J. Hunnefeld
CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
444 S.W. 2nd Ave.
Suite 945
Miami, FL 33130
(305) 416-1800

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
7916 Bressingham Dr.
Fairfax Station, VA 20039
(202) 944-2874
robert.peck@cclfirm.com

Attorneys for Respondent
Additional counsel listed on inside cover

Erwin Chemerinsky
UNIVERSITY OF
CALIFORNIA, IRVINE
401 East Peltason Drive
Educ. 1095
Irvine, CA 92697
(949) 824-7722

Rachel Geman
Daniel E. Seltz
LIEFF CABRASER
HEIMANN &
BERNSTEIN, L.L.P.
250 Hudson Street
8th Floor
New York, NY 10013
(212) 355-9500

Joel Liberson
Howard Liberson
TRIAL & APPELLATE
RESOURCES, P.C.
400 Continental Blvd.
6th Floor
El Segundo, CA 90245
(310) 426-2361

Sherrie R. Savett
Sarah R. Schalman-
Bergen
Patrick F. Madden
BERGER & MONTAGUE,
P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3071

QUESTIONS PRESENTED

1. Whether the term "aggrieved person" in the Fair Housing Act imposes a zone-of-interest requirement more stringent than the case or controversy requirements of Article III, and whether the City falls within the zone of interests when the City alleges it was injured by discriminatory lending practices in violation of the FHA.

2. Whether widespread violations of the Fair Housing Act that directly and foreseeably harm the City's interests in fair housing and result in other economic harms to the City satisfy the Act's proximate cause requirements.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

BRIEF FOR RESPONDENTS 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Miami files a Complaint. 3

B. The District Court dismisses the Complaint with prejudice. 7

C. The Eleventh Circuit reverses. 8

D. Return to the District Court. 10

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. The City Falls Squarely Within the Zone of Interests Covered by the FHA. 12

A. The Zone of Interest test focuses on the scope of the statute and provides no barrier to standing when an arguable interest exists. 12

B. Congressional intent, reflected by the FHA's text, legislative history,

and case law supports standing for Miami. 15

1. The conditions that brought the FHA into being, reflected in its text, support standing. 15

2. Jurisprudence under the FHA supports standing. 17

3. *The 1988 amendments to the FHA reinforce standing under the Act.* 22

C. *Thompson*'s reading of Title VII does not control construction of the FHA. 27

1. Thompson *did not impair* Trafficante's *interpretation of the FHA.* 28

2. Thompson's *approach to "aggrieved person" would not oust Miami from court.* 30

II. The City Has Sufficiently Pleaded Proximate Cause. 31

A. Miami adequately pleaded a causal chain that sufficiently satisfies proximate cause. 34

B. Miami should be afforded the opportunity to prove its allegations..... 45

C. The FHA has no directness requirement. 46

D. Even if FHA proximate cause imposes a directness requirement, Miami's complaint satisfied or could satisfy the requirement. 50

CONCLUSION..... 57

TABLE OF AUTHORITIES

Cases

Air Couriers Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991) 14

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) 49, 55

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 48

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 12

ATA Airlines, Inc. v. Federal Express Corp., 665 F.3d 882 (7th Cir. 2011) 33

Bald Eagle Area School District v. Keystone Finanical, Inc., 189 F.3d 321 (3d Cir. 1999) 47

Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) 30

Bazemore v. Friday, 478 U.S. 385 (1986) 48

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 36

Bennett v. Spear, 520 U.S. 154 (1997) 13, 28

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 14

Blue Shield of Virginia V. McCready, 457 U.S. 465 (1982) 35, 37

Central Virginia Community College v. Katz, 546 U.S. 356 (2006) 29

City of Newport Beach v. Pacific Shores Properties, LLC, 135 S. Ct. 436 (2014) 45

Clarke v. Securities Industry Association, 479 U.S. 388 (1987) 13

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 38

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 29

CSX Transportation, Inc. v. McBride, 564 U.S. 685 (2011) 37, 39

DeKalb County v. HSBC North America Holdings Inc., No. 1:12-cv-03640-SCJ, 2013 WL 7874104 (N.D. Ga. Sept. 25, 2013) 34

Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005) 32

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996) 35, 45

Forest Grove School District v. T.A., 557 U.S. 230 (2009) 25

Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006) 47

General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318 (1980) 26, 31

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) ..... *passim*

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) ..... *passim*

Hemi Group, LLC v. City of New York, New York, 559 U.S. 1 (2010) 35, 37, 56

Hilton v. South Carolina Public Railway Commission, 502 U.S. 197 (1991) 57

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 47, 48, 49

In re: Neurontin Marketing & Sales Practices Litigation., 712 F.3d 60 (1st Cir. 2013) 47

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) 25

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) 35

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 29

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 17

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 32

Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) ..... *passim*

Lorillard v. Pons, 434 U.S. 575 (1978) 25

Marr v. Rife, 503 F.2d 735 (6th Cir. 1974) 39

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) 13

Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847 (D. Md. 2010) 34

Meyer v. Holley, 537 U.S. 280 (2003) 34

Milwaukee & St. Paul Railway Co. v. Kellogg, 94 U.S. 469 (1876) 37

Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982) 7, 9, 30

National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998) 30

New West, L.P v. City of Joliet, 491 F.3d 717 (7th Cir. 2007) 46

Norfolk Southern Railway Co. v. Sorrell, 549 U.S. 158 (2007) 39

Pacific Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013) 45, 55

Paroline v. United States, 134 S. Ct. 1710 (2014) 35, 37

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 29

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 28, 29

Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 29

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 38

Staub v. Proctor Hospital, 562 U.S. 411 (2011) 55

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 32

Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015) ..... *passim*

Thompson v. North American Stainless, LP, 562 U.S. 170 (2011) ..... *passim*

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) ..... *passim*

Warth v. Seldin, 422 U.S. 490 (1975) 13

Yates v. United States, 135 S. Ct. 1074 (2015) 27

Constitutional Provisions

U.S. Const. art. III ..... *passim*

Statutes

5 U.S.C. § 701 *et seq.* 14

7 U.S.C. § 601 *et seq.* 14

18 U.S.C. § 1961 *et seq.* 47

41 U.S.C. § 3602(i) 27

42 U.S.C. § 1983 32

42 U.S.C. § 2000e-(f)(1) 27

42 U.S.C. § 2000e-5(b) 27

42 U.S.C. § 2000e-5(f)(1) 26

42 U.S.C. § 3601 ..... 3, 11, 15

42 U.S.C. § 3601 *et seq.* 1, 15

42 U.S.C. § 3602(f) 15

42 U.S.C. § 3606 15

42 U.S.C. §§ 2000e-2(a) 27

42 U.S.C. §§ 2000e-2(m) 27

42 U.S.C. §§ 3612-3614 17

45 U.S.C. § 51 *et seq.* 37

Civil Rights Act of 1968, § 810 (codified as amended at 42 U.S.C. § 3610) 18, 19

Civil Rights Act of 1968, § 812 (codified as amended at 42 U.S.C. § 3612) 19

Pub. L. No. 100-430, 102 Stat. 1619 (Sept. 13, 1988) (codified as amended at 42 U.S.C. §§ 3601-3619) 22

Pub. L. No. 111-21, 123 Stat. 1617 (May 20, 2009) (codified as amended at 31 U.S.C. § 3729) 54

Regulations

24 C.F.R. § 103.25(d) 23

Other Authorities

114 Cong. Rec. 2274 (1968) 16

114 Cong. Rec. 2706 (1968) 18

114 Cong. Rec. 2993 (1968) 16

134 Cong. Rec. S10454 (1988) 23

Apgar, W., M. Duda & R. Gorey, *The Municipal Costs of Foreclosures: A Chicago Case Study* (2005) 44

Bank of America Corp. Annual Report (2015) 40, 42, 43

City of Miami, Department of Community and Economic Development, *About Us* 52

Combating Problems of Vacant and Abandoned Properties (June 2006) 44

Financial Crisis Inquiry Report (Jan. 2011) 54

Greiner, D. James, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533 (2008) 47

H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 1988 (1988) 17, 23, 24, 25

H.R. Rep. No. 96-865, 96th Cong., 2d Sess. 4 (1980) 24

Impact of the Mortgage Foreclosure Crisis on vacant and Abandoned Properties in Cities—a 77 City Survey (June 2010) 44

Keeton, W Page, *et al.*, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 38, 39

Report of the National Advisory Commission on Civil Disorders (1968) 16

Ropiequet, John L., *A Curious Dichotomy: Fair Lending Litigation and Enforcement Actions Following Wal-Mart Stores, Inc. v. Dukes*, Banking & Fin. Services Pol'y Rep. (Jan. 2013) 24

Rubinfeld, Daniel L., "Reference Guide on Multiple Regression," in Federal Judicial Center, *Reference Manual on Scientific Evidence* (2d ed. 2000) 47

S. 867, 100th Cong. (1987) 25

Seng, Michael P., F. Willis Caruso, *Forty Years of Fair Housing: Where Do We Go from*

Here?, 18 J. Affordable Housing & Community Dev. L. 235 (Winter 2009) 26

U.S. Census Bureau, *State & County Quick Facts: Miami (city), FL* (2015) 50

Vacant and Abandoned Properties Survey and Best Practices (2008) 44

Wells Fargo Annual Report (2013) 42

Wells Fargo Annual Report (2014) 42

Wells Fargo Annual Report (2015) 40, 41, 42

Rules

Fed. R. Civ. P. 12(b)(6) 45

BRIEF FOR RESPONDENTS

INTRODUCTION

Although the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, is nearly a half century old, discrimination and segregation in housing remain a serious problem throughout the United States. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2515 (2015). As Congress recognized in enacting the FHA and as countless studies have shown since, discriminatory lending practices have contributed significantly to segregation and blight in American cities. This case presents the question of whether a city can sue to stop the discriminatory lending practices of banks. Because a city is injured in numerous ways by such discrimination, it should be deemed "aggrieved" within the meaning of the FHA and allowed to sue.

The suggestion that this unit of government is without the authority to pursue fair housing in the courts is not supported by the history and purpose of the FHA or this Court's jurisprudence. After all, the state of America's cities and the economic and social challenges they faced arising from a volatile racial divide impelled Congress to enact the FHA in the first place. To address that urban crisis, Congress wisely authorized a wide range of potential plaintiffs, public and private, to vindicate the anti-discrimination principles advanced by the FHA and later expanded that reach in 1988.

It is particularly important that cities be a part of the solution, as urban centers are where the impact of systemic housing discrimination is most acutely

felt. Cities across the country are engaged in combatting discrimination, resolving complaints, and remediating neighborhoods. When housing discrimination occurs on a widespread basis within a city, it diminishes tax revenues while demanding disproportionate amount of resources, diverting law enforcement, fire departments, and building and safety efforts, and endangering the entire community.

Permitting cities to vindicate their important rights under the FHA will not expand the scope of parties eligible to pursue such claims to include local stores. Rather, the simple retort is that only parties with an interest in fair housing, such as the City of Miami, have standing to vindicate their rights. A neighborhood store is not similarly situated to a municipality, and the relief sought by Miami will not result in an expansion of liability under the FHA beyond the bounds authorized by Congress.

Since *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 98 (1979), upheld municipal standing to pursue claims like Miami's, cities have taken wrongdoers to court, though infrequently. When it amended the FHA in 1988, Congress did not merely acquiesce to *Gladstone*'s holding that FHA standing is as broad as Article III permits, but explicitly endorsed it. In the all too few instances where cities or counties have exercised that authority, sometimes with the assistance of the Justice Department, progress was made in the battle against housing discrimination. Few municipalities will have the wherewithal, endurance, and political willpower to undertake the arduous task of a lawsuit against one of its most prominent corporate citizens. When the

cases have been brought successfully, damages are nowhere near the astronomical sums imagined by the Bank. Still, the easiest way to avoid liability would be to stop discriminating.

The damages attributable to discriminatory lending are not difficult to identify. In instances like those presented here, the injuries due to discrimination, rather than other causes, can be traced with precision through regression analysis and provide a fair basis for liability.

In the end, Miami's lawsuit against the Banks fits squarely within the FHA's purpose of providing "for fair housing throughout the United States." 42 U.S.C. § 3601. In a case like this one, involving allegations of intentional discrimination, significant evidence of disparate impact, and injunctive and declaratory relief sought, the FHA would be robbed of its force if the unit of government most closely and directly affected was denied standing to bring an action. The lower court's decision should be affirmed.

STATEMENT OF THE CASE

A. Miami files a Complaint.

On December 13, 2013, Plaintiff-Respondent City of Miami ("City") filed a detailed, 56-page Complaint (*see* J.A. 23-104), against Bank of America and a number of its subsidiaries (collectively, "Bank"), alleging that it had violated the FHA by engaging in discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and significant, direct, and continuing financial harm to the City. As

alleged in the Complaint, the discriminatory lending practices disproportionately "plac[ed] vulnerable, underserved [minority] borrowers in loans they cannot afford." Then, as the City alleged, "when a minority borrower who previously received a predatory loan sought to refinance the loan, . . . [the Banks] refused to extend credit at all, or on terms equal to those offered when refinancing similar loans issued to white borrowers." *Id.* at 36.

As the Eleventh Circuit correctly characterized the allegations, the City alleged "the bank targeted black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged employees to provide these types of loans." Pet. App. 2a.

The Complaint included statements from several former Bank employees referenced as confidential witnesses ("CW's"), who described the Bank's practice of targeting minority borrowers for the issuance of discriminatory loans, underwriting loans that borrowers could not afford, and inducing foreclosures by refusing to refinance or modify the original loans on fair terms and limiting access to credit. J.A. 37, 70-73.

The Complaint further alleged that a regression analysis of available data reported by the Bank demonstrated that African-American borrowers were 1.581 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics.

Latino borrowers were 2.087 more likely to receive such loans. These disparities existed even among borrowers with FICO credit scores above 660. An African-American borrower with a FICO score greater than 660 was 1.533 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics, and a Latino borrower with a FICO score above 660 was 2.137 times more likely to receive such loans. *Id.* at 78-79. These results are consistent with the allegations that 21.9 percent of loans made to minority borrowers in Miami were high-cost, whereas only 8.9 percent of loans to white borrowers were high-cost. *Id.* at 74-75.

The Complaint also alleged facts that these loan practices foreseeably resulted in foreclosures, did so more rapidly for African-American and Latino borrowers than whites, and that the foreclosures were caused by the discriminatorily unfavorable loan terms. For example, a discriminatory loan in Miami was 1.721 times more likely to result in foreclosure than a non-discriminatory loan. *Id.* at 87. Additionally, a discriminatory loan to an African-American borrower in Miami was 2.744 times more likely to result in foreclosure than a non-discriminatory loan to a white borrower with similar risk characteristics, and a discriminatory loan to a Latino borrower was 2.861 times more likely to result in foreclosure than a loan in a predominantly non-discriminatory loan to a white borrower with similar risk characteristics. *Id.* Moreover, the Complaint alleged that a loan made to a borrower residing in a predominantly minority neighborhood in Miami was

5.857 times more likely to result in foreclosure than a loan in a non-minority neighborhood. *Id.* at 36, 82.

As a result of these practices, the Complaint alleged that property values of the homes vacated and of other homes in the same neighborhoods as newly vacated homes diminished and caused a loss of tax revenues to the City. *Id.* at 31, 40, 88-92. Moreover, the Complaint alleged that a Hedonic regression analysis can calculate the City's loss attributable to the Bank's discriminatory lending practices and separate out other potential causes. *Id.* at 90-92. In addition, the City suffered other economic damages beyond lost tax revenues because it has had to expend additional monies on municipal services to address problems of vagrancy, criminal activity, and threats to the public health and safety arising at these properties because of their foreclosed status, as well as to remediate newly blighted neighborhoods. *Id.* at 88-95. To make concrete any generalized allegations, the City preliminarily identified 3,326 discriminatory loans issued by the Banks between 2004-2012 that resulted in foreclosure and, in the Complaint, provided sample addresses for ten homes. *Id.* at 95-96. In addition to monetary damages, Miami further sought injunctive and declaratory relief. *Id.* at 101-02.

A second cause of action in the Complaint alleged that the Defendants unjustly enriched themselves by taking advantage of "benefits conferred by the City and, rather than engaging in lawful lending practices," engaged in racially discriminatory mortgage practices that "denied the City revenues it had properly expected through property and other tax payments and by costing the City additional monies

for services it would not have had to provide in the neighborhoods affected by foreclosures due to predatory lending, absent the Defendants' unlawful activities." *Id.* at 100-01.

B. The District Court dismisses the Complaint with prejudice.

On July 9, 2014, the District Court granted the Bank's motion to dismiss with prejudice with respect to the allegations based on the FHA, while dismissing the cause of action premised on unjust enrichment without prejudice. Pet. App. 58a-76a. The District Court concluded that Miami lacked standing based upon its reading of *Nasser v. City of Homewood*, 671 F.2d 432 (11th Cir. 1982). *Id.* at 65a-68a. The District Court further concluded that "proximate causation for standing" was not adequately alleged because Miami failed to allege facts that isolate the Bank's practices as the sole cause of the City's injuries. *Id.* at 69a. Finally, the District Court concluded that Miami's claims were time-barred, but acknowledged that an amendment could cure the Court's concerns. *Id.* at 78a-83a.

On July 21, 2014, the City timely moved for reconsideration, proffering a proposed First Amended Complaint to make more explicit a number of issues that were implicit in the original Complaint with respect to its FHA claims, particularly focusing upon Miami's interest in fair housing and an integrated society. J.A. 185-250. The proposed Complaint further provided additional details deemed lacking by the Court with respect to its unjust enrichment claim. *Id.* at 246-47.

On September 9, 2014, the District Court denied the motion for reconsideration, holding that Plaintiff's arguments were "ones that the Plaintiff already made or that it could have, but chose not to" and do not "cause the Court to reconsider its prior Order." Pet. App. 82a. The Court did offer Miami additional time to file a new complaint based on the claim for unjust enrichment alone. *Id.* at 83a. The City, choosing not to split its causes of action, declined to file a single-cause of action complaint, and instead filed a timely notice of appeal on October 7, 2014.

C. The Eleventh Circuit reverses.

The Eleventh Circuit reversed the District Court in a unanimous opinion. First, it held "the phrase 'aggrieved person' in the FHA extends as broadly as is constitutionally permissible under Article III," relying on this Court's identical holdings in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972); *Gladstone*, 441 U.S. at 98; and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Pet. App. 27a. It recognized that the more recent Title VII decision in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), "gestured in the direction of rejecting that interpretation, [but] a gesture is not enough." *Id.* It noted that "*Thompson* itself was a Title VII case, not a Fair Housing Act case," and that *Thompson* only stated "that any suggestion drawn from the FHA cases that Title VII's cause of action is similarly broad was 'ill-considered' dictum." Pet. App. 82a (citing *Thompson*, 562 U.S. at 176).

The Eleventh Circuit rejected the District Court's application of its decision in *Nasser*, 671 F.2d 432, where the plaintiff alleged no FHA violation. Instead, it held that "the City claims to have suffered an economic injury resulting from a racially discriminatory housing policy," which was sufficient to state a claim under the FHA. Pet App. 29a. It concluded that the zone of interest analysis applicable to the FHA "encompasses the City's allegations in this case." *Id.* at 30a.

It further held that the City's allegations were sufficient to meet the FHA's proximate cause requirement, stating that the Complaint alleged "the Bank's discriminatory lending caused property owned by minorities to enter premature foreclosure, costing the City tax revenue and municipal expenditures." *Id.* at 39a. It added, "[a]lthough there are several links in that causal chain, none are unforeseeable." *Id.* The court further noted that the Complaint "alleges that the Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices 'and their attendant harm,' such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues." *Id.* at 38a. It rejected the District Court's requirement that proximate cause be isolated, as though it were the sole cause. *Id.* at 38-41a. As to the other issues raised by the Bank or the District Court's opinion, the Eleventh Circuit remanded the case to allow the City to file an amended complaint.

D. Return to the District Court.

Upon remand, the City filed a Second Amended Complaint (ECF No. 84), which the District Court dismissed without prejudice on March 17, 2016 on statute of limitations grounds. ECF No. 98. The City filed a Third Amended Complaint on April 29, 2016. ECF No. 102. The Bank filed a motion to dismiss for failure to state a cause of action on May 16, 2016 (ECF No. 103), but proceedings were stayed pending this Court's decision. ECF No. 128.

SUMMARY OF ARGUMENT

The City of Miami filed intentional and disparate impact claims that Bank of America issued undesirable mortgages to African-American and Latino borrowers. The Bank knew that the loans would likely end in default. If that occurred, it was entirely foreseeable that the City would be harmed.

The Bank asks this Court to reverse the Eleventh Circuit's well-reasoned decision and dismiss these claims, arguing that the City's financial injury is only remotely derived from allegedly discriminatory conduct. However, a fair reading of the City's Complaint makes plain that the City has a strong and inherent interest in the benefits of an integrated community and was harmed in its fair housing efforts, while suffering further injuries in the form of lowered property tax revenues and remediation costs. The City's amended complaint makes those interests and connections even more clear. The Bank also overlooks Miami's request for declaratory and injunctive relief as well. The City's claims and alleged injuries are similar to those sustained in 1979 in *Gladstone*.

The FHA was enacted to eradicate housing discrimination with a special emphasis on the problems discrimination causes for cities. When the Act was amended in 1988, Congress strengthened the Act to assure greater enforcement efforts through litigation, both public and private. In doing so, Congress explicitly endorsed the "broad holdings" of this Court's jurisprudence, which established that FHA standing reaches as far as Article III permits. This broad reach is consistent with the FHA's purpose "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. No other civil rights law embraces that reach.

Recent jurisprudence concerning other civil rights statutes do not support narrowing the scope of FHA standing and explicitly approve the approach and result in *Gladstone*, which upheld municipal standing for claims and asserted injuries similar to Miami's. Moreover, the strong congressional intent to support direct and indirect claims under the FHA validates Miami's cause of action.

Miami also meets the proximate cause requirements of an FHA action. The City was directly harmed in its fair housing efforts by the Bank's issuance of discriminatory loans, much as the non-profit organization afforded standing in *Havens*. A plaintiff must only demonstrate proximate cause substantial enough and close enough to the harm to effectuate the law's purposes. That benchmark was met by Miami's pleadings. Using regression analysis of the discriminatory loans identified, Miami alleged it was able to separate out the effect of other potential causes so that its claims were limited to

discriminatory loans and the harms they caused. Moreover, the sophisticated analytical tools used by banks reveal which loans will likely enter foreclosure even before they are issued, and countless studies demonstrate foreclosures' impact on cities.

It would be a remarkable concept to enjoin cities from enforcing one of the nation's most important anti-discrimination statutes, when the effects of housing discrimination are most acutely experienced in the Nation's urban centers. Here, the City's interest and the harms visited upon it by discrimination provide the requisite standing. As the Eleventh Circuit correctly held, Miami should have its day in court, because its claims fit squarely within the law's zone of interests and causal requirements.

ARGUMENT

I. The City Falls Squarely Within the Zone of Interests Covered by the FHA.

A. The Zone of Interest test focuses on the scope of the statute and provides no barrier to standing when an arguable interest exists.

To be within the zone of interests protected or regulated by a constitutional provision or statute, a plaintiff must assert an interest recognized by the underlying statute. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The cognizable interests can be as diverse as "'aesthetic, conservational, and recreational'" as well as "economic values." *Id.* at 153-54. This Court has never retreated from this broadly inclusive approach. The zone-of-

interests test "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). In fact, this Court has noted "we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.* Thus, the "test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke*, 479 U.S. at 399).

To make the "zone" determination, a court applies Congress's "evident intent" and emphatically does "not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id.* (quoting *Clarke*, 479 U.S. at 399-400). Congress may make the relevant zone of interest as broad or as narrow as it chooses, as long as it confers standing in accordance with Article III's requirement of a "case or controversy." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). *See also Bennett v. Spear*, 520 U.S. 154, 164-65 (1997) (authorizing standing under the Endangered Species Act to all who allege an interest in the animals' preservation).[1] The test is statute-specific and uses "traditional tools of statutory

---

[1] Justice Scalia's opinion for the Court in *Bennett* "follow[ed] *a fortiori* from our decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 93 S. Ct. 364, 34 L.Ed.2d 415 (1972), which held that standing [under the FHA] was expanded to the full extent permitted under Article III." 520 U.S. at 165.

interpretation [to determine] whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377. 1389, 1387 (2014).[2]

---

[2] Because the zone test is referred to as "statutory standing," *Lexmark*, 134 S. Ct. at 1388 n.4, the Bank's invocation of *Air Couriers Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991) and *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), *see* BoA Br. 38-39, is unavailing. While both cases involved challenges to agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the standing inquiry in APA cases is informed by the statute that granted the agency authority to promulgate the rules. Neither authority-granting statute used the adversely affected standard in the FHA, even though the APA does. For example, in *Block*, this Court looked to the scope of the Agricultural Adjustment Act, 7 U.S.C. § 601 *et seq.*, and denied standing because Congress intended to limit eligible plaintiffs to those entitled "to participate in the development of market orders" and because consumer lawsuits "would severely disrupt this complex and delicate administrative scheme." 467 U.S. at 346, 348. Similarly, in *Air Couriers*, the zone-of-interest inquiry focused on the Private Express Statutes, which give the U.S. Postal Service a monopoly over letter carrying. 498 U.S. at 519. Neither statute is comparable to the FHA, which encourages both public and private lawsuits to vindicate the FHA's purpose, and neither precedent provides helpful guidance.

B. Congressional intent, reflected by the FHA's text, legislative history, and case law supports standing for Miami.

1. The conditions that brought the FHA into being, reflected in its text, support standing.

To "address[] the denial of housing opportunities," the FHA prohibits "[d]iscriminatory housing practices," including discrimination in sales, rentals, and real estate transactions. 42 U.S.C. §§ 3602(f), 3606. The Bank focuses myopically upon those prohibitions to claim that the "FHA's private civil action is primarily about obtaining redress for individual injury, not vindicating public rights." BoA Br. 17. Nothing in the statute imposes or even suggests such a limit, though Congress could have so provided. This Court, in turn, has rejected the Bank's narrow conception of the FHA's purposes in cases like *Trafficante* and *Gladstone*. The Bank's assertion also flies in the face of the FHA's purpose, language, context, and legislative history. Congress expressed the law's unique and enormous breadth in its very first section, declaring its purpose: "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. No other civil rights law embraces that reach.

Congress enacted the FHA, 42 U.S.C. § 3601 *et seq.*, in response to an urban crisis in which segregated and deteriorating inner cities were centers of unrest, crime, and turmoil. Residential segregation and unequal housing and economic conditions in the

inner cities produced the social unrest afflicting the Nation's cities, according to the federal commission established to investigate the conditions. *Inclusive Cmtys.*, 135 S. Ct. at 2516 (citing *Report of the Nat'l Advisory Comm'n on Civil Disorders* 91 (1968) ("Kerner Comm'n Report")). Urban riots, following the assassination of Dr. Martin Luther King, Jr., provided the backdrop to the FHA's enactment. *Id.*

The FHA's legislative history reflects Congress's intention to broaden the Act's scope beyond individual enforcement by individual victims of discrimination. One of the principal sponsors of the Act, Senator Mondale, put the proposed legislation into the context that the Kerner Commission described. Confronting "fantastic pressures," the nation's cities suffered from a "[d]eclining tax base, poor sanitation, loss of jobs, inadequate educational opportunity and urban squalor" for which "[f]air housing legislation is a basic keystone to any solution of our present urban crisis." 114 Cong. Rec. 2274 (1968). Senator Mondale understood that tolerance of continued housing discrimination would lead to the "destruction of our urban centers by loss of jobs and business to the suburbs, a declining tax base, and the ruin brought on by absentee ownership of property." 114 Cong. Rec. 2993 (1968) (statement of Sen. Mondale). His principal co-sponsor, Senator Brooke, called unequal housing an "economic problem affecting all the urban centers of America" and one that will render "cities . . . less and less able to cope with their problems, financially and in every other way." 114 Cong. Rec. 2987, 2988 (statement of Sen. Brooke). Plainly, the FHA's sponsors were focused on

the impact of unequal housing on cities and its ripple effects on municipal finances and services.

2. *Jurisprudence under the FHA supports standing.*

In case after case, this Court has broadly interpreted who has standing to sue under the FHA. The FHA is "a comprehensive open housing law." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Compared to other civil rights statutes, the FHA's "'potential for effectiveness . . . is much greater . . . because of the sanctions and the remedies that it provides.'" *Id.* at 415 n.19. To achieve its capacious purpose of providing for fair housing throughout the nation to the extent that the Constitution permits and to honor its "broad and inclusive" language, this Court decreed that the FHA must be given "generous construction" in order to carry out a "policy that Congress considered to be of the highest priority." *Trafficante*, 409 U.S. at 211-12. Recently, referencing the statute's first provision, this Court declared that the FHA's "central purpose" is to "eradicate discriminatory practices within a sector of our Nation's economy." *Inclusive Cmtys.*, 135 S. Ct. at 2521. *See also* H.R. Rep. No. 100-711, at 15, 100th Cong., 2d Sess. 1988 (1988) (hereinafter "H.R. Report") (FHA "provides a clear national policy against discrimination in housing"). Consistent with that breadth and goal, the FHA provides for both private and governmental rights of action. *See* 42 U.S.C. §§ 3612-3614.

This Court's broad interpretation of the FHA's standing requirements began with *Trafficante*. In

that case, this Court found that standing was available to two tenants who asserted an injury from the impairment of the social benefits of integration, business and professional opportunities, and other advantages because an apartment building owner discriminated against prospective tenants other than themselves. *Trafficante*, 409 U.S. at 206-08. Cities share the same interests asserted by the tenants.

Trafficante rejected the conclusion that the FHA's zone of interests limited lawsuits only to "persons who are the objects of discriminatory housing practices." *Id.* at 208. Instead, this Court held that Congress intended standing under the Act to be as broad as is permitted by Article III of the Constitution. *Id.* at 209. It noted that "proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered," an interpretation consistent with that of the Department of Housing and Urban Development ("HUD"). *Id.* at 210 (footnote citation omitted). The Court also cited the observation of Senator Javits that housing discrimination not only harms the "'victim of discriminatory housing practices,'" but "'the whole community.'" *Id.* at 211 (citing 114 Cong. Rec. 2706 (1968)). Moreover, the Court accepted the representations of the United States that enforcement of the FHA was dependent on private attorneys general, as the government had limited resources to undertake such actions, even when authorized, *id.* at 211, thereby placing enormous importance on the availability of private litigation by third parties.

The Court affirmed the FHA's broad standing requirements in *Gladstone*. While Trafficante sued on the basis of § 810, in *Gladstone*, the Village of Bellwood went to court for violations of the FHA by a realty firm under § 812.[3] In *Gladstone*, 441 U.S. 91, Bellwood's barebones complaint alleged it had

> "been injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village," and that the individual respondents "have been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society."

Id. at 95 (ellipses in original).

This Court, examining legislative history, rejected the argument that differences between the two provisions authorizing lawsuits, § 810 (available to a "person aggrieved") and § 812 (without a plaintiff definition) limited lawsuits by indirect victims of discrimination, holding "that §§ 810 and 812 are available to precisely the same class of plaintiffs." *Id.* at 105. Turning to Bellwood's complaint, the Court recognized that a "significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services," as

---

[3] Section 812 lacked limitations on plaintiffs, as long as they sought to enforce the FHA. *Gladstone*, 441 U.S. at 101.

well as "rob[s] Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct." *Id.* at 110-11.

Adhering to the holding in *Trafficante* that the FHA's "within constitutional limitations" mandate conferred standing as broadly as Article III permits, *see* 409 U.S. at 209, *Gladstone* held that a municipality has standing to pursue injuries to its tax base and the resulting effect on its budget, due to discriminatory housing practices. Significantly, this Court declared:

> As long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates someone's § 804 rights, and thus are entitled to seek redress of that harm under § 812.

441 U.S. at 103 n.9.

Notably, this Court recently endorsed the standing analysis employed in *Gladstone* as wholly compatible with the zone-of-interest test. *Thompson*, 131 S. Ct. at 869. Thus, Miami's claim, indistinguishable from Bellwood's, also meets this Court's recent articulation of the applicable standard, whether that standard is Article III standing or something more constrained. *Thompson*'s approval of

Bellwood's standing forecloses the Bank's argument based on *Thompson*. The City submits that its original Complaint fairly establishes that the City's Bellwood-like injuries resulted from the Bank's racially imbalanced mortgage practices. The FHA was intended to address the very combination of interests and injuries Miami has suffered.[4]

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), this Court reaffirmed the Article III reach of FHA standing. *Havens* afforded standing to a non-profit organization that operated a "housing counseling service, and investigat[ed] and referr[ed] complaints concerning housing discrimination." The organizational plaintiff claimed that the discriminatory steering practices "had frustrated the organization's counseling and referral services, with a consequent drain on resources," and deprived its members "of the benefits of interracial association." *Id.* at 369. *Havens* stated that *Gladstone* "*held* that 'Congress intended standing under § 812 to extend to the full limits of Art. III' and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [§ 812]." *Id.* at 372 (emphasis added) (citing *Gladstone*, 441 U.S. at 103 n.9). *See also id.* at 375-76. *Havens* then emphatically agreed: "the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact." *Id.* at 372.

---

[4] If Miami's Complaint somehow insufficiently alleges those interests and injuries, the solution, as in *Havens*, is a remand that would "afford the plaintiffs an opportunity to make more definite the allegations of the complaint." 455 U.S. at 378.

Whether the source of the injury is direct or indirect, such claims of injury based on "an adverse impact on [a] neighborhood" resulting from discriminatory housing practices, is "of little significance in deciding whether a plaintiff has standing to sue under § 812 of the Fair Housing Act." *Id.* at 375. As a result, *Havens* held that the impairment of the organization's ability to provide counseling and referral services and the "consequent drain on the organization's resources" constituted a "concrete and demonstrable injury" sufficient to confer standing.

Miami's injuries are no less concrete and demonstrable. The discriminatory mortgage lending practices at issue here directly harm the City's fair housing efforts, deprive it of the benefits of an integrated community, rob properties and neighborhoods of their value, diminish tax revenues, and demand extra police, fire, and safety attention, draining the City's resources. The FHA was intended to end that cycle of urban blight, and Miami's lawsuit plainly furthers those interests.

3. *The 1988 amendments to the FHA reinforce standing under the Act.*

The Bank treats this Court to a revisionist legislative history of the 1988 amendments, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (Sept. 13, 1988) (codified as amended at 42 U.S.C. §§ 3601-3619), asserting that the amendments "materially changed the statute's reach" so as to add limits to the array of private plaintiffs eligible to bring suit by virtue of the

enhanced litigation role it authorizes for the federal government. BoA Br. 26, 26-37.

To the contrary, the primary motivation for the 1988 amendments was a bipartisan consensus that stronger enforcement was needed, including through litigation. As the amendments' sponsor, Senator Kennedy, explained upon introduction of the final bill, the FHA was a "toothless tiger" that "proved to be an empty promise because the legislation lacked an effective enforcement mechanism." 134 Cong. Rec. S10454 (1988) (statement of Sen. Kennedy). That criticism is reflected as well in the House Report. H.R. Report 13 (FHA "fails to provide an effective enforcement system to make that promise a reality"). The report added that the FHA's limited means for enforcing the law" constitutes "the primary weakness in existing law." *Id.* While creating an administrative enforcement system,[5] the amendments were intended "to remov[e] barriers to the use of court enforcement by private litigants and the Department of Justice." *Id.*

The new amendments recognized that "private enforcement has achieved some success," but also acknowledged that enforcement was "restricted by the limited financial resources of litigants and the bar,

---

[5] The Bank erroneously asserts that "HUD appears to have implicitly rejected" the idea that the FHA provides a remedy for anyone other than those "discriminated against." BoA Br. 25 n.9 (citing 24 C.F.R. § 103.25(d)). The creation of an administrative remedy, however, did not detract from the authority that the FHA gives to initiate a lawsuit. Instead, Congress categorically endorsed *Gladstone*'s recognition that standing extends as far as Article III permits. H.R. Report 17.

and by disincentives in the law itself." *Id.* at 15. To encourage more private litigation, Congress "strengthen[ed] the private enforcement section by expanding the statute of limitations, remov[ing] the limitation on punitive damages [thereby boosting the private attorney general status of private litigants], and [bringing] attorney's fees language in Title VIII closer to the model used in other civil rights laws [so that it was no longer limited to those who could not afford counsel]." *Id.* at 16.

The amendments did, as the Bank points out, BoA Br. 36-37, authorize the "Attorney General to intervene in private cases of general public importance" and "seek substantial civil monetary penalties against violators."[6] H.R. Report 17. Lawsuits similar to Miami's, brought by Baltimore and Memphis, were settled as part of a case brought against Wells Fargo by the Justice Department, which alleged that the Bank had discriminated against 34,000 African-American and Hispanic borrowers during a six-year period through 2009." John L. Ropiequet, *A Curious Dichotomy: Fair Lending Litigation and Enforcement Actions Following Wal-Mart Stores, Inc. v. Dukes*, Banking & Fin. Services Pol'y Rep., at 1 (Jan. 2013). However, the Justice Department has not intervened in any others.

---

[6] Congress had long been disappointed with the level of Justice Department pursuit of fair housing violations. Between the passage of the FHA in 1968 and 1980, the Justice Department brought only about 300 lawsuits. *See* Fair Housing Amendments Act of 1980, H.R. Rep. No. 96-865, 96th Cong., 2d Sess. 4 (1980).

When it turned to the definition of "aggrieved person," which the amendments made applicable to all private litigation, Congress acknowledged this Court's decision in *Gladstone* and *Havens* and its holding that both avenues of litigation for private litigation were identical, and stated that the "bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified *to reaffirm the broad holdings of these cases.*" H.R. Report 17 (emphasis added).

Moreover, Senator Hatch offered, but Congress did not adopt, a narrowed definition of "aggrieved person" that would have made the law more like what the Bank now asks of the Court. The Senator's bill would have defined "aggrieved person" as a person whose bona fide attempt to buy, sell, lease, or finance a dwelling has been denied on a discriminatory basis, thereby limiting plaintiffs to those who were the direct victims of discrimination. Equal Access to Housing Act of 1987, S. 867, 100th Cong. (1987). The failure of that bill further confirms that Congress did not impair the approach to standing that this Court utilized in *Trafficante*, *Gladstone*, and *Havens*.

This Court has held that "[w]hen Congress amend[s an Act] without altering the text of [the relevant provision], it implicitly adopt[s this Court's] construction" of that provision. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009). *See also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (finding it "not only appropriate but also realistic to presume that Congress was thoroughly familiar with [earlier relevant precedent] and . . . expected its enactment . to be interpreted in conformity with it")

(internal quotation marks and alterations omitted); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

In *Inclusive Communities*, this Court similarly found that Congress' decision to amend the FHA in 1988 against the backdrop of existing precedent was "convincing support that Congress accepted and ratified" these holdings. 135 S. Ct. at 2520. Here, Congress explicitly reaffirmed this Court's prior treatment of aggrieved person in *Gladstone* and *Havens* when approving the 1988 Amendments.

The Bank's contention that the extension of enforcement authority to the federal government necessarily means that Congress narrowed eligible plaintiffs lacks support in the text or the legislative history of the FHA. In the context of Title VII, this Court rejected a similar argument in *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, 325-26 (1980) (holding the 1972 amendments to Title VII "expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers" and "*was intended to supplement, not replace, the private action*" (emphasis added)). The same conclusion obtains here. The 1988 amendments, two commentators said, gave the FHA "perhaps the broadest array of remedies available under any federal civil rights statute." Michael P. Seng, F. Willis Caruso, *Forty Years of Fair Housing: Where Do We Go from Here?*, 18 J. Affordable Housing & Community

Dev. L. 235 (Winter 2009). The amendments dramatically enhanced both public and private litigation, removing any doubt that Miami has standing to pursue this lawsuit.

C. *Thompson*'s reading of Title VII does not control construction of the FHA.

The Bank premises its cramped interpretation of "aggrieved" under the FHA upon this Court's Title VII decision in *Thompson*, 562 U.S. 170. There, this Court construed Title VII's authorization to "a person claiming to be aggrieved" to be the person injured by a discriminatory employment act. *See* 42 U.S.C. § 2000e-5(b), (f)(1).

Thompson's definition of "aggrieved person" for Title VII does not control interpretation of similar language in the FHA. Title VII differs from the FHA in a number of ways. For example, Title VII does not have purpose language like that of the FHA, indicating Congress's intent to prohibit the subject discrimination "within constitutional limitations." While Title VII hinges heavily on the motive behind an adverse employment decision, *see* 42 U.S.C. §§ 2000e-2(a), (m) , the FHA focuses on results. *Inclusive Communities*, 135 S. Ct. at 2118-19, 2525. Perhaps most importantly, the FHA specifically defines "aggrieved person," 41 U.S.C. § 3602(i), whereas Title VII does not.

This Court has made clear that "[w]e have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 135 S. Ct. 1074,

1082 (2015) (providing examples). Here, precedent and legislative history support reading aggrieved person more broadly in the FHA than Title VII.

1. Thompson *did not impair* Trafficante's *interpretation of the FHA.*

To the Bank, *Thompson*'s characterization of the treatment of "aggrieved person" in *Trafficante* as "ill-considered dictum," 562 U.S. at 176, resolves the issue in this case. BoA Br. 26. In doing so, the Bank misreads *Thompson*, which made clear that *Traffficante*'s take on the standing requirements of Title VII constituted *dictum*, not its holding on the standing requirements of the FHA. *Thompson* emphasized that "it is Title VII rather than Title VIII that is before us here, and as to that we are surely not bound by the *Trafficante* dictum." 562 U.S. at 176. What was the *Trafficante dictum*? It was "dictum that the *Title VII aggrievement requirement* conferred a right to sue on all who satisfied Article III standing." *Id.* (emphasis added). In other words, it was what *Trafficante* said about Title VII, not what it said about the FHA. Its decision about the FHA's scope was not *dictum*. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). In fact, this Court has characterized the *Trafficante* statement that standing reaches as far as Article III permits as a holding several times, including in an opinion written by the author of *Thompson*. *See Havens*, 455 U.S. at 372; *Bennett*, 520 U.S. at 165 (Scalia, J.).

Even if *dicta*, the statements about law decided by this Court, briefed and put in issue by the parties, are entitled to precedential value. *Cf. Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 363 (2006) (suggesting that *dicta* that was fully debated is binding). This Court has followed judicial *dicta* when it is a "well-established rationale upon which the Court based the results of its earlier decisions." *Seminole Tribe*, 517 U.S. at 66-67. Moreover, the "principle of stare decisis directs us to adhere not only to the holdings of . . . prior cases, but also to . . . explications of the governing rules of law." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) ("Although technically *dicta*, . . an important part of the Court's rationale for the result that it reache[s] . . . is entitled to greater weight") (O'Connor, J., concurring).

In fact, even if Congress had not endorsed this Court's prior constructions of the FHA so strongly, the Court's statements—whether *dicta* or not—have "'special force,'" for "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). While the Bank raises a false specter of absurd results, *see infra* p. 37-38, flowing from a generous approach to standing, this Court has stated that it cannot "limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark*, 134 S. Ct. at 1388.

2. Thompson's *approach to "aggrieved person" would not oust Miami from court.*

Thompson reaffirmed *Trafficante*'s approach to FHA standing by rejecting an "artificially narrow" reading of "aggrieved" that would have limited plaintiffs to direct victims of discrimination, the same approach advocated here by the Bank. *Thompson*, 562 U.S. at 177. It held that such an approach "contradicts the very holding of *Trafficante*, which was that residents of an apartment complex were 'person[s] aggrieved' by discrimination against prospective tenants." *Id.*

Instead of adopting a view that only direct victims of discrimination ought to have standing, *Thompson* held that the term 'aggrieved' in Title VII covers "any plaintiff with an interest 'arguably [sought] to be protected by the statute,'" *id.* at 178 (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 495 (1998) (internal quotation marks omitted)). The only plaintiffs excluded under that approach were those "whose interests are unrelated to the statutory prohibitions in Title VII." *Id.* That limitation is consistent with that of the court below and adopts the same distinction that the Eleventh Circuit utilized in differentiating its holding in *Nasser*, 671 F.2d 432 (holding a developer challenging rezoning was outside the FHA's zone of interest because the lawsuit had no fair housing purpose) from its decision in *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407 (11th Cir. 1989) (holding developer challenging rezoning was within the FHA's zone of

interest because the lawsuit asserted the rezoning was the product of racial animus). *See* Pet. App. 29a-30a.

If Congress intended to limit plaintiffs to objects of discrimination, the *Thompson* Court said, "it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'" 562 U.S. at 177.

It would be a remarkable concept to create a barrier to standing for cities to enforce one of the nation's most important anti-discrimination statutes. The FHA explicitly recognizes that both private parties and government have authority to enforce its mandates through lawsuits and standing is afforded "within constitutional limitations" to direct and indirect victims of housing discrimination. Here, the City is both a governmental entity and a private enforcer of the Act. The effect that the scourge of housing discrimination causes upon it is undeniable and helped call the FHA into being. Governmental units have "statutory duties, responsibilities, and interests" "broader than the discrete interests of any particular private party," and acts more than as "a proxy for the victims of discrimination." *Gen. Tel. Co. of the Nw., Inc.*, 446 U.S. at 326. Here, the City's interest and the harms visited upon it by discrimination provide the requisite standing.

II. The City Has Sufficiently Pleaded Proximate Cause.

Miami pleaded a chain of causation that sufficiently establishes that the Bank's conduct was the proximate cause of the City's injuries. Even if FHA

proximate cause has a directness requirement, the City satisfies that benchmark because the Bank's misconduct in issuing discriminatory loans had a direct effect on the City's efforts to assure fair housing.

In *Inclusive Communities*, this Court required a plaintiff seeking to "make out a prima facie case of disparate impact" "to allege facts at the pleading stage *or* produce statistical evidence demonstrating a causal connection." 135 S. Ct. at 2523 (emphasis added). It did not impose a heightened pleading standard, which is something this Court has unanimously rejected in discrimination cases. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). In fact, "[o]rdinary pleading rules are not meant to impose a great burden on a plaintiff, but [instead] provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 337 (2005). *Cf. Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166-68 (1993) (rejecting a "more stringent" pleading standard intended to weed out non-meritorious liability claims under 42 U.S.C. § 1983 and shield defendants from "expensive and time-consuming discovery").

Miami met the *Inclusive Communities* standard. The City pleaded a prima facie case of disparate-impact FHA liability through statistical disparities in the treatment of minority and white borrowers tied to a policy that caused the disparity, J.A. 38, 75, 78-89, as required by *Inclusive Communities*. *See* 135 S. Ct. at 2523. *See* Pet. App. 6a-10a, 59a-61a, Additionally, Miami presented

statements from former Bank employees, establishing that the Bank intentionally discriminated against minority borrowers. J.A. 70-72.

Miami's Complaint utilized a rigorous and well-accepted method of multivariate statistical regressions to analyze the pattern of discrimination and its impact on the City. *Cf., e.g., ATA Airlines, Inc. v. Fed. Express Corp.*, 665 F.3d 882, 889-90 (7th Cir. 2011) (Posner, Easterbrook, Wood, JJ.) (discussing the difference between proper and improper statistical regressions). The Bank's argument that other factors could have caused the City's injuries—some of which were controlled for in the regression analysis—merely contradicts the well-pleaded factual allegations of the complaints, which cannot be considered on a motion to dismiss.

This Court's approval of similar municipal claims in *Gladstone*, confirms the legitimacy of the City's causal theory. Moreover, *Havens*' holding that both direct and indirect harms are within the contemplation of the FHA's prohibitions controls the applicable proximate cause analysis and supports Miami's claims. *See* 455 U.S. at 375.

The few cases brought since Gladstone also undermines the assertion made by the Bank and its amici that cities suing banks will become a cottage industry. BoA Br. 6-7; Br. of the Cato Inst. 12; Br. of the Am. Bankers Ass'n 10-12. Affirmance, they claim, will force settlements in cases brought by cities with an "insatiable appetite," Cato Br. 12, or create disincentives to lending in disadvantaged communities. Br. of Chamber of Commerce of the U.S.

5. Yet, given the history of redlining perpetrated by banks (J.A. 33-36), the discriminatory lending at issue here, and recent revelations about scandalous bank practices, lawsuits are necessary for their deterrent effect.

Since January 8, 2008, when Baltimore filed its similar lawsuit, *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 848 (D. Md. 2010), the Bank identifies only twelve such separate local governments that have gone to court, three of which joined together to file a single lawsuit. *See DeKalb Cnty. v. HSBC N. Am. Holdings Inc.*, No. 1:12-cv-03640-SCJ, 2013 WL 7874104 (N.D. Ga. Sept. 25, 2013). The Eleventh Circuit's ruling did not encourage new cases, even within states comprising that circuit.[7]

A. Miami adequately pleaded a causal chain that sufficiently satisfies proximate cause.

Miami's allegations of proximate cause are sufficient because the injury to Miami was the direct, foreseeable result of the Banks' conduct. An FHA action is, "in effect, a tort action" and, as a general matter, tort principles derived from the common law control. *Meyer v. Holley*, 537 U.S. 280, 285 (2003)

---

[7] The Chamber claims two cases were prompted by the Eleventh Circuit's decision: Oakland, California and Cobb County, Georgia. Chamber Br. 6-7. Oakland filed its lawsuit on September 21, 2015, six days after the Eleventh Circuit's ruling, but the City Council had to have approved its filing weeks before the decision below. Cobb County was already engaged in FHA litigation two years earlier. *See DeKalb Cnty.*, 2013 WL 7874104.

("when Congress creates a tort action, it legislates against a legal background of ordinary tort-related liability rules and consequently intends its legislation to incorporate those rules"). Pursuant to these principles, proximate-cause analysis "normally eliminates the bizarre," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536 (1995), and the connection cannot be "so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996)). The proximate-cause analysis excludes only those "link[s] that [are] too remote, purely contingent, or indirect." *Hemi Group, LLC v. City of N.Y., N.Y.*, 559 U.S. 1, 9 (2010).

Miami's allegations are neither bizarre, nor the product of mere fortuity or unforeseen contingency, but were readily foreseeable to the Bank. Indeed, given the close and well-recognized connection between discriminatory actions and the harms alleged by the City, it may be fairly said that the "injury alleged is so integral an aspect of the [violation] alleged [that] there can be no question" that proximate cause is present. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982).

This Court's decision in *Gladstone* confirms the sufficiency of Miami's allegations that the Bank's conduct was the proximate cause of the injuries alleged. In *Gladstone*, this Court ruled that the same chain of causation alleged here was sufficient. The Village of Bellwood had sued, alleging that discriminatory real estate practices caused a downward deflection of housing prices and a

concomitant diminution of Bellwood's tax base, "thus threatening its ability to bear the costs of local government and to provide services."[8] 441 U.S. at 110, 111. The chain of causation alleged for Bellwood is precisely the chain alleged here.

This Court enhanced *Gladstone*'s holding in its controlling analysis in *Havens*. In *Havens*, this Court contrasted the standing of "testers," those who do not actually seek housing but test to see if discrimination is occurring, with "'neighborhood' standing," based on deprivation of the benefits of living in an integrated community. 455 U.S. at 375. Testers' injuries are direct, this Court held, but the injury derived from neighborhood standing "is an indirect one." *Id.* The "distinction is, however, of little significance" in the context of the FHA, and the "injury alleged thus clearly resembles that which we found palpable in Bellwood," where the harm deprived the municipality of "'the social and professional benefits of living in an integrated society' and had caused them 'economic injury.'" *Id.* at 375-76 (quoting *Gladstone*, 441 U.S. at 115 & n.30).

Even to the extent *Gladstone* and *Havens* do not control, Miami's allegations are sufficient under this Court's proximate-cause jurisprudence. That

---

[8] Even as it held that the allegations were sufficient, this Court recognized that Bellwood's complaint was "more conclusory and abbreviated than good pleading would suggest," *Gladstone*, 441 U.S. at 110, even under the pre-*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), criteria. By contrast, Miami's Complaint spanned 56 pages and provided enormous detail about the connections between the Bank's misconduct and the harm flowing to the City.

analysis involves the degree of connection required between the harm and prohibited conduct and is statute-specific.[9] *Lexmark*, 134 S. Ct. at 1390.

Recently, this Court explained that proximate cause is "often explicated in terms of foreseeability," *Paroline*, 134 S. Ct. at 1719, as the Eleventh Circuit did below. Pet. App. 38a. *See also Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) (to satisfy proximate cause, an injury must be the "natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances"); *Blue Shield*, 457 U.S. at 479. All that is required is that the alleged cause be "one with a sufficient connection to the result." *Paroline*, 134 S. Ct. at 1719. Even a dissenting opinion upon which the Bank heavily relies acknowledges that an "intervening third-party act, even if criminal, does not cut a causal chain where the intervening act is foreseeable and the defendant's conduct increases the risk of its occurrence." *Hemi Grp.*, 559 U.S. at 25 (Breyer, J., dissenting). Moreover, as Justice Breyer explained the "concept of directness in tort law [is used to] expand liability (for direct consequences) beyond what was foreseeable, not to eliminate liability for what was foreseeable." *Id.*

---

[9] For example, the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, utilizes a relaxed proximate cause standard, in recognition of the importance the statute places on the safety of railroad workers. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011).

A proximate cause must only be "substantial enough and close enough to the harm to be recognized by law, [and] a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). *See also* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) ("If the defendant's conduct was a *substantial factor* in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." (emphasis added)).

The injury to Miami in the form of a decreased tax base and increased costs of remediating blighted neighborhoods and operating its fair-housing program was not merely foreseeable but identified by this Court as a consequence of FHA-prohibited discriminatory conduct more than 37 years ago in *Gladstone*.

The Bank disputes that a foreseeable injury is sufficient under the FHA, exclaiming this Court has rejected a "foreseeability-only approach to proximate cause" in all instances, BoA Br. 44. Instead, the Bank argues for a "directness inquiry" that must establish "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." BoA Br. 46.

In rejecting a "foreseeability-only approach, the Bank relied on *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 553 (1994). That reliance is misplaced. *Consolidated Rail* involved two FELA cases decided

on summary judgment, not at the pleading stage as this one was. The case did not define the proper proximate cause pleading requirement for all statutes and was supplanted in a critical respect by *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 180 (2007), which recognized the propriety of legal arguments based on foreseeability, and *McBride*, 564 U.S. at 692, which rejected the directness approach advocated by the Bank. *Paroline*'s recent recognition of foreseeability also forecloses the Bank's categorical rejection of this traditional common-law approach.

In any event, foreseeability is not an exercise in consequences as far as the mind can imagine. It operates in the context of the zone of interests the statute establishes and is individual to each statute. Where, as here, the statute constitutes a "broad legislative plan to eliminate all traces of discrimination within the housing field," *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974), and its language "is broad and inclusive," *Trafficante*, 409 U.S. at 209, foreseeability is cabined in its reach by the purposes served by the legislation. Because the FHA protects both direct and indirect injuries, *Havens*, 455 U.S. at 375, the statute is unlike those "'intended to protect only a particular class of persons or to guard only against a particular risk or type of harm'" for which foreseeability alone is inappropriate. BoA Br. 51 (quoting Keeton, *supra*, at § 53).

Moreover, the parade of horribles conjured up by the Bank in using a foreseeability standard for proximate-cause analysis, including utilities and local stores suing over lost customers as a result of discriminatory loans that blighted a neighborhood,

BoA Br. 3, 57-58, constitutes an imaginative hypothetical but is not comparable to Miami's situation. The Bank's imaginary plaintiffs could not claim that their interest in promoting and vindicating fair housing were adversely affected, in contrast to the inherent and active interest in fair housing of a U.S. city. It was urban decay and unrest that the FHA was designed to address. *See supra* p. 15-16. Unlike a local store, Miami stands in similar shoes to a non-profit who assists in equal access to housing and expends resources to identify and counteract discriminatory housing practices. The Bank does not dispute the standing of that non-profit, or the proximate cause behind its economic injuries. *See* BoA Br. 32. Cities, too, should not be barred from undertaking such a lawsuit as well.

Banks face no undue burden from application of a foreseeability inquiry for proximate cause that is informed by the statutory zone of interest of the FHA. There was no mystery to the harm discriminatory lending practices had on the Miami community. The sheer magnitude of the Banks' mortgage operations suggests they had actual knowledge of the well-being of the mortgages they financed. In 2015 alone, Wells Fargo originated $213.2 billion in residential mortgage loans. *Wells Fargo Annual Report* 30 (2015) ("WF Report"), *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2015-annual-report.pdf, and Bank of America funded $70 billion in residential home loans. *Bank of America Corp. Annual Report* 1 (2015) ("BoA Report"), *available at* http://media.corporate-ir.net/media_files/IROL/71/71595/AR2015.pdf. A multi-billion-dollar business with

extensive regulatory and reporting obligations and sophisticated risk management mechanisms cannot be said to be unaware that a large number of loans to specific categories of borrowers in specific cities will generate and actually have generated foreclosures. This is particularly true in Florida: at the time Miami filed its complaint in 2013, the State had the country's highest foreclosure rate and Miami had the highest foreclosure rate among the 20 largest metropolitan statistical areas in the country. J.A. 32, 268.

Indeed, a cursory review of the banks' detailed public statements as reflected in recent Annual Reports provides extensive discussion concerning the scope and extent of the banks' underwriting, risk management, compliance, and internal audit functions, confirming that they possessed actual knowledge of the consequences of their lending practices.[10] For example, Wells Fargo recites in exhaustive detail practices and procedures regarding risk management, which in turn, describe its risk culture, incorporating "three lines of defense" and an extensive list of internal responsible parties overseeing that risk. WF Report 58-62.

Wells Fargo further describes its procedures pertaining to credit risk management, including residential mortgage loans. It explains that it uses extensive "risk measurement and modeling," as well

---

[10] The City has gleaned this information from publicly available statements of the banks. It is not difficult to imagine how additional information would be available through discovery to establish the banks possessed actual knowledge of the consequences of their lending practices.

as a "continual loan review and audit process" to adhere "to a well-controlled underwriting process." *Id.* at 63. It also "employ[s] various credit risk management and monitoring activities to mitigate risks associated with multiple risk factors affecting loans we hold, could acquire, or originate." *Id.* The bank's credit monitoring for residential mortgage loans includes consideration of factors such as FICO scores, delinquencies, loan to value and combined loan to value ratios. *Id.* at 69.[11]

Bank of America's recent annual reports similarly document that bank's purportedly elaborate practices and procedures regarding risk management. Beyond its extensive discussion of its risk framework, it relies upon a risk management process referred to as identify, measure, monitor and control as part of its daily activities. BoA Report 47-51.

As the Eleventh Circuit recognized, the banks employ sophisticated analytic tools to perform consumer credit risk analysis. Pet. App. 38a-39a. The Bank states that "credit risk management for the consumer portfolio begins with initial underwriting and continues throughout a borrower's credit cycle. BoA Report 64. It utilizes "[s]tatistical techniques in conjunction with experiential judgment in all

---

[11] Substantially similar discussions concerning risk management can be found in prior annual reports. *See, e.g.*, *Wells Fargo Annual Report* (2014), *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2014-annual-report.pdf, and the *Wells Fargo Annual Report* (2013), *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2013-annual-report.pdf.

aspects of portfolio management including underwriting, product pricing, risk appetite, setting credit limits, and establishing operational processes and metrics quantify and balance risks and returns." *Id.* Statistical models "using detailed behavioral information" "are used in part to assist in making both new and ongoing credit decisions." *Id.*

While a particular borrower might experience a random, unexpected set of circumstances that might somehow escape the banks' comprehensive risk management practices and procedures, randomness cannot explain the volume of 990 discriminatory loans issued by Wells Fargo and another 3,325 by Bank of America preliminarily identified in Miami's Complaint. J.A. 95, 341. Miami alleged that its use of Hedonic regression analysis enabled it to eliminate those that were not the product of improper and discriminatory considerations. J.A. 91-82, 232-37, 336-38, 416-21.

Armed with actual knowledge that their lending conduct resulted in foreclosures, it requires no giant leap to conclude the banks were well-aware of the harm such conduct inflicted upon municipalities. To begin with, any large residential mortgage lender recognizes that a foreclosed property is located within a community that has the obligation to alleviate the resulting blight to preserve the health, welfare, and safety of its residents. Furthermore, banks routinely conduct appraisals during the lending process, and therefore, readily understand the relationship between foreclosures and property values, and, consequently, the reduction in property taxes resulting from lowered property values.

Moreover, the Banks were certainly aware of the seminal report published in 2005 by William Apgar and Mark Duda of the Joint Center for Housing Studies at Harvard that exhaustively documented the connection between foreclosures and the resulting injuries suffered by communities.[12] *See* J.A. 64-65, 301-02.

Furthermore, the linkage between foreclosures and municipal injuries was extensively documented by the United States Conference of Mayors. *See Combating Problems of Vacant and Abandoned Properties* (June 2006), *available at* http://usmayors.org/bestpractices/vacantproperties06.pdf, *Vacant and Abandoned Properties Survey and Best Practices* (2008), *available at* http://www.usmayors.org/bestpractices/vacantproperties08.pdf, and *Impact of the Mortgage Foreclosure Crisis on vacant and Abandoned Properties in Cities—a 77 City Survey* (June 2010), *available at* https://usmayors.org/publications/2010%20VAP%20Report.pdf. Thus, extensive, publicly available studies document the connection articulated by this Court in *Gladstone* between discriminatory lending practices and their impact on cities within the sector of the Nation's economy that the FHA addresses. The connection is neither bizarre nor attenuated. Rather, it was a foreseeable and sufficiently direct consequence of the banks' discriminatory conduct.

---

[12] W. Apgar, M. Duda & R. Gorey, *The Municipal Costs of Foreclosures: A Chicago Case Study* (2005), *available at* http://www.995hope.net/content/pdf/Apgar_Duda_Study_Full_Version.pdf.

B. Miami should be afforded the opportunity to prove its allegations.

Lexmark made clear a plaintiff is not required to *prove* proximate causation to defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6): "If a plaintiff's allegations, taken as true, are . . . sufficient [to establish proximate causation], then the plaintiff is entitled to an opportunity to prove them." *Lexmark*, 134 S. Ct. at 1391 n.6. After all, causation is an intensely factual question that should typically be resolved by the fact-finder. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). *See also Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013), *cert. denied sub nom. City of Newport Beach v. Pac. Shores Props., LLC*, 135 S. Ct. 436 (2014).

However, per *Inclusive Communities*, Miami's complaint pleads statistical disparities in the treatment of minority and white borrowers tied to a policy that caused the disparity, J.A. 38, 75, 78-89. Miami's complaint relies upon a rigorous and well-accepted method of multivariate statistical regressions to analyze the pattern of discrimination and its impact on the City. These allegations meet Miami's pleading burden, including the burden of sufficiently pleading proximate cause.

As the Eleventh Circuit held in reviewing the City's Complaint, "it is clear that the harm the City claims to have suffered has 'a sufficiently close connection to the conduct the statute prohibits.'" Pet. App. 40a-41a (quoting *Lexmark*, 134 S. Ct. at 1390). The Court recognized the difficult task of proof that

the City faces, but found that "[a]t this stage, it is enough to say that the City has adequately pled proximate cause, as required by the FHA." *Id.* at 41a. The City should be allowed to assay its proof.

C. The FHA has no directness requirement.

The Bank argues that the claim is insufficient because it is not based on a "direct" harm. BoA Br. 49-52. Yet, in *Havens*, this Court resolved this issue and held that the distinction between direct and indirect harms was "of little significance in deciding" whether an FHA plaintiff had a cause of action. 455 U.S. at 375.

For some laws, it matters whether the injuries are direct or derivative, but "[t]he Fair Housing Act is not among those statutes." *New West, L.P. v. City of Joliet*, 491 F.3d 717, 721 (7th Cir. 2007) (holding indirect, derivative injuries are cognizable and compensable under the FHA). Like Miami here, the Village of Bellwood claimed lost property taxes and other expenses based on discrimination perpetrated against others. *See Gladstone*, 441 U.S. at 109-11. In *Havens*, a non-profit organization advancing fair housing successfully claimed a drain on its resources from impairment of its mission, not direct discrimination. 455 U.S. at 378-79.

In this way, the FHA contrasts with other federal statutes to which the Bank compares it. *See* BoA Br. 49. For example, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, presents natural concerns for directness in the proximate-cause analysis because the action

depends on the existence of closely connected predicate acts. *See Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999). Thus, in the RICO context, this Court held a directness requirement was part of proximate-cause analysis because the language of RICO was based on the Clayton and Sherman Acts, which also require a direct relationship, and because it is otherwise difficult to "ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 269 (1992) (citation omitted).[13] In

---

[13] The Bank asserts that similar considerations apply under the FHA because the City's damages could be the product of other factors, "such as job loss, the financial crisis [which was precipitated by the conduct of banks in its housing lending, *see infra* p. 51], illness, and divorce, to name only a few." BoA Br. 50. However, the City anticipated these issues and asserted, directly in its Complaint, that regression analysis, employed by statisticians to eliminate the extent to which other factors played a role in the claims and damages like those of the City and to determine whether race influenced decision making, could sort through these disparate causes. Pet. App. 7a-10a, 39a, 60a-61a. *See also Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006) (discussing the importance of regression analysis). The analysis can control for a variety of potential influences, while estimating the size and statistical significance of the individual influences. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533 (2008). *See also In re: Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 69 (1st Cir. 2013) ("regression analysis is a widely accepted method of showing causation"); Daniel L. Rubinfeld, "Reference Guide on Multiple Regression," in Federal Judicial Center, *Reference Manual on Scientific Evidence* 179-227 (2d ed. 2000).

Given that a regression analysis, even one that "includes less than 'all measurable variables' may serve to prove a plaintiff's case," *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), the City's allegations in its pleading were more than enough to

addition, *Holmes* noted that the statute's treble damages provision provided a special incentive for "directly injured victims . . . to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70. Such an incentive does not exist within the FHA, where directly injured victims are, for the reasons stated below, ill-positioned to vindicate the law.

While *Holmes* found that RICO "should not get [] an expansive reading," *id.* at 266, this Court has consistently interpreted the FHA broadly. *See, e.g., Havens*, 455 U.S. at 372; *Gladstone*, 441 U.S. at 109. That capacious interpretation is a function of the importance Congress placed on the rights the FHA protects. The Bank's RICO cases are, thus, inapposite. The requirements for "proximate cause" under one federal statute aimed at one harmful activity are not the same as under a different statute aimed at an entirely different harmful activity. The question presented requires statutory interpretation, not citation to and reliance on unrelated cases that intone the words "proximate cause."

Similarly, in *Lexmark*, this Court held that a Lanham Act lawsuit required an "injury flowing directly from the deception" at issue. Even under this

---

provide a sufficiently close causal connection between the FHA violations and the City's injuries and gives rise to a "reasonable inference that [the Bank] is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), as the Eleventh Circuit held. Pet. App. 34a-41a, 55a. Thus, the Banks' argument is attempting to refute well-pleaded factual allegations on a motion to dismiss, which it may not do.

"directness" inquiry, the plaintiff was allowed to proceed although not a consumer or direct competitor of Lexmark. Its injuries were plainly "not direct, but include[d] the intervening link of injury to the remanufacturers." 134 S. Ct. at 1391, 1394. Thus, this Court recognized that the plaintiff's allegations "might not support standing under a strict application of the 'general tendency' not to stretch proximate causation 'beyond the first step.'" *Id.* at 1394 (quoting *Holmes*, 503 U.S. at 271). Even so, it still found sufficient continuity between the injury to the direct victim and the injury to the indirect victim "without the need for any 'speculative . . . proceedings' or 'intricate, uncertain inquiries.'" *Id.* (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006)).

While RICO and other federal statutes restrict standing and provide incentives for individual lawsuits, Congress adopted a broad approach to standing in the FHA in support of the idea that eradicating housing discrimination is a priority of the first order. *Trafficante*, 409 U.S. at 212. The Bank cites no case that holds that the *FHA* imposes a requirement that the harm caused proceed in the first step from violations of the act—and *Havens* denies that. Instead, recognizing that lawsuits by individuals, by itself, were insufficient to realize its goals, Congress created an important and broad role for government in vindicating the law. In fact, individual borrowers are ill-equipped to recognize patterns of discrimination that give rise to disparate-impact claims. They do not know that what may have happened to them happened to others. They do not have the means to undertake the statistical analysis necessary to assert a prima facie claim or resources to

engage in such litigation. Governmental entities, such as cities, and organizations dedicated to fair housing, more often do.

D. Even if FHA proximate cause imposes a directness requirement, Miami's complaint satisfied or could satisfy the requirement.

Even if this Court accepts the Bank's invitation to impose a more stringent "proximate cause" requirement on FHA pleadings, Miami's Complaint states a claim because the City's alleged injuries were caused by the Bank's unlawful discriminatory acts and the City has a palpable interest in fair housing. It cannot be said that the Banks' misconduct in issuing discriminatory loans did not have a direct effect on the City's efforts to assure fair housing.

Miami is a diverse community with an estimated population of 441,003. U.S. Census Bureau, *State & County Quick Facts: Miami (city), FL* (2015), http://www.census.gov/quickfacts/table/PST045215/1245000,00 (last visited Sept. 25, 2016). The City has an inherent interest in racial diversity and non-discrimination in order to achieve the many benefits of living in an integrated community. This interest is directly harmed by the Bank's discriminatory lending policies. In this way, the City's interest easily exceeds that of the individual white and black residents in a single apartment complex, who asserted the same interest in an integrated community, claims this Court permitted to proceed under the FHA in *Trafficante*.

Miami's claim is consistent with this Court's holdings that recognize that the impact of misconduct on a municipality's "racial composition" adversely affects the municipality's housing market, pricing, and property values, "directly injure[s] a municipality by diminishing its tax base," undermines the village's interest in "'stable, racially integrated housing,'" and begins "to rob [municipality] of its racial balance and stability." *Gladstone*, 441 U.S. at 110-11. If these connections were substantial and sufficient in 1979, then there is no reason to treat them as remote or too attenuated today. The municipal interest approvingly identified for the Village of Bellwood is shared by all municipalities, especially the City of Miami.

Among its efforts that distinguish the City's interests in integrated housing, distinctive from that of a local shop or utility, Miami established a "Department of Community & Economic Development," which has responsibility for operating the City's fair housing program, a program designed to "affirmatively further fair housing objectives of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, as amended, and other relevant federal, state, and local housing laws." J.A. 233. Through the Department, "the City actively works to reduce illegal housing discrimination" by providing "education and training, monitoring and investigating fair housing complaints utilizing techniques to support fair housing litigation, and conduct research and studies to identify and address fair housing impediments." *Id.*

In fact, the Department's mission statement declares that it "assists in creating a viable urban

community for the most needy persons in our City while reducing poverty, embracing diversity, assisting with economic development, and improving the overall quality of life." City of Miami, Department of Community and Economic Development, *About Us*, *available at* http://www.ci.miami.fl.us/communitydevelopment/pages/about_us/ (last visited Sept. 25, 2016). Plainly, the City has a strong, active, and longstanding interest in the professional, stability, and quality of life benefits of an integrated community.

The connection between the Bank's conduct and the injury to Miami's interest in a stable, integrated community, its economic injuries and its request for injunctive relief, is sufficient to satisfy the requirements of proximate cause. The Bank's discriminatory conduct adversely affected those interests directly in a foreseeable way. The City's fair-housing efforts inform the proximate-cause analysis, support the causal connection, and distinguish the City from non-participants in fair housing. They establish that the City suffered its damages while fighting the very "conduct the statute prohibits." *Lexmark*, 134 S. Ct. at 1390-91.

Moreover, logical steps, adequately alleged, connect the Bank's unlawful acts with the full array of the City's injuries: the City asserts that the Bank issued loans on a discriminatory basis, targeting African-Americans and Latinos for less favorable treatment. This steering of minority homebuyers to costlier loans greatly increased the likelihood of foreclosures, as the Bank's own analytical tools would have shown.

Borrowers charged more for a loan than they qualify for, or deceived into taking a loan they cannot afford, are far more likely to lose their home to foreclosure. And the loans associated with this discriminatory conduct did, in fact, result in a significantly increased rate of foreclosures. Many of those foreclosed homes will fall into disrepair and become vacant, resulting in the loss of property taxes, impairment of the city's fair housing efforts, and imposition of remediation and other costs to the city. Without the Bank's actions, these foreclosures and vacancies would not have occurred. This conclusion is more than plausible, having been adopted by this Court in *Gladstone*, 441 U.S. at 110-11 ("[a] significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services"), and is further supported by authoritative federal investigation. These foreclosures resulting from the banks' discriminatory lending practices decimated minority neighborhoods in Miami, suppressed the property tax values of both the foreclosed properties and surrounding properties, and impeded the City's interest in stable, integrated communities.

The nationwide scale of the Bank's improper targeting of minority borrowers through predatory loans served as the percussion cap that propelled a host of economic evils that created the recent financial crisis. The federal Financial Crisis Inquiry Commission, appointed pursuant to Public Law No. 111-21, 123 Stat. 1617 (May 20, 2009) (codified as amended at 31 U.S.C. § 3729), concluded that "it was the collapse of the housing bubble—fueled by low

interest rates, easy and available credit, scant regulation, and toxic mortgages—that was the spark that ignited a string of events, which led to a full-blown [financial] crisis in the fall of 2008." *Financial Crisis Inquiry Report* xvi (Jan. 2011) ("FCIR"), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. The report details a doubling of homes put into foreclosure in 2006-07 within months of taking a loan because "they likely took out mortgages that they never had the capacity or intention to pay," in part because mortgage brokers "were paid 'yield spread premiums' by lenders to put borrowers into higher-cost loans so they would get bigger fees, often never disclosed to borrowers." *Id.* at xxii. Simply put, "[l]enders made loans that they knew borrowers could not afford." *Id.* As a result of these actions, *the Commission found it entirely foreseeable that the crisis would occur. Id.* Moreover, Miami alleged that the misconduct continued after that dark period had passed in the form of other loans that were more expensive and riskier and which were disproportionately made to minority borrowers. J.A. 69, 214, 306, 388.

Given the directness of the injury Miami alleges flowing from the Bank's conduct, Miami's allegations satisfy any directness requirement that could be imposed, because "directness" cannot be denied in the effect of the alleged misconduct on Miami's fair housing efforts.

Precedents make clear that the "fact that FHA plaintiffs' injuries must be proximately caused by the defendant's discriminatory acts does not, of course, mean that defendants are not liable for foreseeable,

but indirect, effects of discrimination." *Pac. Shores Props.*, 730 F.3d at 1168 n.32. For example, in *Lexmark*, even though the plaintiff's injuries were not "direct," this Court found sufficient continuity between the injury to the direct victim and the injury to the indirect victim "without the need for any 'speculative . . proceedings' or 'intricate, uncertain inquiries.'" 134 S. Ct. at 1394 (quoting *Anza*, 547 U.S. at 459-60). Thus, the "directness" or "anti-derivative" version of the rule propounded by the Bank was actually rejected by *Lexmark*, as it found that a non-competing manufacturer could show sufficient proximate cause to bring an action based on Lexmark's false advertising to others, not the plaintiff.

Similarly, in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), this Court found no fatal break in the causal chain when the employment action was ultimately taken by a company official without any discriminatory animus, but that the termination of employment could still be traced back to previous actions taken by someone else with the requisite animus. It was sufficient that the improper motive was a causal factor. *Id.* at 422.

The consequences of such a strict directness requirement of the type imagined by the Bank at the pleading stage could undermine the FHA's commitment to routing out housing discrimination and would be inconsistent with the disparate-impact regime this Court only recently validated in *Inclusive Communities*.[14] It would undermine the ability of non-

---

[14] The Bank also asserts that Miami must allege its injuries are an "'intended' or "'desired' consequence of [the

profits as in *Havens* and municipalities as in *Gladstone* to vindicate the FHA's promise of tearing down the barriers that divide us in the housing market. That promise must be vindicated by governmental entities, victims of discrimination, and stand-ins for those victims, such as non-profits and developers who can demonstrate their own injuries. With a mandate and purpose as broad as it has, and where the individual victims of discrimination can never realize the scope and full consequences of the violations visited upon them, cities must be among those who can connect the dots and call wrongdoers to account.

Gladstone correctly permitted a municipality to sue over lost tax revenue and the expenses it incurred to advance fair housing and remediate neighborhoods affected by discriminatory housing practices. To be sure, "Congress has had [more than] 30 years in which it could have corrected our decision in [*Gladstone*] if it disagreed with it, and has not chosen to do so," *Hilton v. S. Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991), strongly indicating that there is nothing to correct. The City's injuries are well within the

---

Bank's] alleged conduct." BoA Br. 53 (citing *Hemi Grp., LLC*, 559 U.S. at 24 (Breyer, J., dissenting)). The Bank, however, misreads an observation made by Justice Breyer about the facts in that case and attempts to turn that description into a requirement of proximate cause. Instead, Justice Breyer indicates that foreseeability should be the touchstone for proximate cause if the statute at issue is to be treated as a creature of the common law. *See* 559 U.S. at 25. Here, the City alleged, J.A. 21, and the Eleventh Circuit recognized, *id.* at 38a-39a, that the Bank was in a particularly advantageous position to understand the consequences of its actions.

contemplation of proximate cause as applicable to the FHA.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

September 30, 2016

Respectfully submitted,

Robert S. Peck
Counsel of Record
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
7916 Bressingham Dr.
Fairfax Station, VA 20039
(202) 944-2874
robert.peck@cclfirm.com

Attorney for Respondent